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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6798

GRAYSON C. REED,

Petitioner,

vs.

CARLYLE & MARTIN, INC.
and
CARLYLE & ANDERSON, INC.
and
GROVE MANUFACTURING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 214 Va. 592, 202 S.E.2d 874 (1974).

QUESTION PRESENTED

There is only one question that can be properly presented to this Court, and that is whether the Petitioner was unconstitutionally deprived of a jury trial with respect to the defense of contributory negligence.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, § 11 of the Constitution of Virginia.

STATUTES INVOLVED

Section 8-315.1 of the Code of Virginia.

STATEMENT OF FACTS

References herein are to be the numbered pages of the Appendix filed in the Supreme Court of Virginia and will be referred to as follows: (App., p. .....).

On or about September 20, 1970, Robert L. Hardy, a farmer of Loudoun County, Virginia, purchased from the firm of Carlyle & Martin, Inc., Hagerstown, Maryland, an ensilage loader, sometimes known as a crop chopper or ensilage wagon. (App., p. 75). The wagon was delivered to Mr. Hardy's farm in Loudoun County, Virginia, where Grayson C. Reed worked as a farm laborer. (App., p. 74). Several days later, it was discovered that the drag chain did not operate properly and would not pull the ensilage into the beaters. (App., pp. 46, 77).

A repairman employed by Carlyle & Anderson, Inc., of Purcellville, Virginia, appeared at the Hardy farm in re

sponse to a call for repairs. He advised that he could not make the repairs until the wagon was unloaded. (App., pp. 45, 48, 60). The repairman did not give any instructions on how to unload the wagon, but merely indicated it had to be unloaded before he could repair it. (App., pp. 45, 48, 49).

Mrs. Hardy instructed Mr. Reed and a Mr. Moten to unload the wagon. (App., pp. 56, 57). The wagon was then moved out into a field. The wagon is described as having sides which were about six feet high. (App., pp. 50, 51). It has a gate or large door at the rear and the front end had what were described as "beaters" which throw the ensilage from the wagon onto a conveyor belt which is also in front of the wagon. (App., pp. 49, 50, 51). When the wagon is in operation, the drag chains pull the ensilage toward the front of the wagon into the beaters. (App., p. 51). At the time the wagon was hauled into the field to be unloaded, there was approximately five feet of ensilage contained therein. (App. p. 52). Ensilage is described as freshly cut corn and contains a good bit of sap and is right slippery and all to stand on. (Hardy deposition, p. 89, lines 18-22, designated as an additional part of the record by the Appellees, Carlyle & Martin, Inc., and Carlyle & Anderson, Inc., but not contained in the Appendix).

Mr. Moten stood on top of the ensilage at the back of the wagon and threw it out the back. (App., p. 52). Mr. Reed stood on top of the ensilage in the front of the wagon, and using a pitchfork threw the ensilage toward the beaters. Mr. Reed knew the beaters were operating, and in his deposition testified that he preferred to have the beaters operating as it made the unloading easier and had he known how to turn the beaters off, he would not have turned them off. (App., pp. 70, 71, 72). When the ensilage was about three feet deep below his feet, it gave way, without warning, and Mr. Reed fell into the beaters. (App., pp. 52, 53, 54). At the time his feet gave way, Mr. Reed had created a slope of

ensilage, upon which he was standing, sloping toward the beaters. (App. p. 55). Mr. Reed testified that he guessed his weight pushing on the ensilage caused it to give way. (App., pp. 53, 54, 59). Mr. Reed was injured as a result of his falling into the beaters.

Mr. Reed had worked with ensilage wagons before and had first worked with an ensilage wagon in approximately 1969. The wagon he worked on at that time was a John Deere but he indicated most ensilage wagons are basically the same and that the John Deere wagon had three controls at the front of the wagon which were almost the same as the control on the Grove wagon on which he was injured. (App., pp. 44, 45, 58, 61, 71, 72).

ARGUMENT AND AUTHORITIES

Petitioner relies upon Article I, § 11 of the Constitution of Virginia in support of his claim that he was entitled to a jury trial on the question of contributory negligence. The Supreme Court of Virginia (formerly Supreme Court of Appeals) has held that the foregoing constitutional provision does not guarantee a jury trial when the uncontradicted facts in the case show that a party is not entitled to a trial by jury. *W. S. Forbes & Company* v. *Southern Cotton Oil Company* (1921), 130 Va. 245, 108 S.E. 15, 18. *Gaskill* v. *Commonwealth of Virginia* (1965), 206 Va. 486, 144 S.E.2d, 293; *Manns, Jr.* v. *Commonwealth of Virginia* (1972), 213 Va., 322, 191 S.E.2d, 810.

In order to determine whether Petitioner was guilty of contributory negligence as a matter of law, we refer to that portion of the evidence in the case presented in the Appendix.

In a long line of cases, the most noted of which is *Massie* v. *Firmstone*, 134 Va. 450, 114 S.E. 652 (1922), the Vir-

ginia Supreme Court has held that a plaintiff can rise no higher than his own testimony. Without restating entirely the facts contained in the Statement of Facts, we have in the instant case, a male adult standing upon a sloping pile of slippery cut corn within four to five feet of a set of rapidly turning beaters. All of the testimony of Mr. Reed indicates that he did not appreciate any danger, yet the testimony also discloses there was no inherent or hidden danger which resulted in the injuries he sustained. As a matter of fact, Mr. Reed testified that he guessed his weight pushing on the ensilage caused it to give way. (App., pp. 53, 54, 59). Surely, under all of these facts and circumstances, there can only be one conclusion and that is that the Petitioner was contributorily negligent in exposing himself to a danger which was open and obvious. Certainly, under the law of the Commonwealth of Virginia, this is contributory negligence.

However, even if the Court were to believe that the Petitioner, Mr. Reed, did not appreciate the danger to which he was exposing himself, as the Supreme Court of Virginia stated in *Budzinski* v. *Harris,* 213 Va. 107, 189 S.E.2d 372

> ". . . Knowledge of the risk is not necessary if, in the exercise of ordinary care, one should have known of its existence . . ." P. 110

Mr. Reed argues that he was not warned of this danger, was not given any instructions on how to unload the wagon, and was not instructed in how to properly operate the wagon. He cites these factors as being the basis for liability upon the Respondents. However, when we look at the testimony of Mr. Reed, his deposition clearly showed he was familiar with the operation of this type of wagon, that the controls on this wagon were the same as the controls on the John Deere wagon on which he had previously worked, and that had he looked, he would have found those con-

trols in the same position in which they were located on the John Deere wagon. His counsel argues that had Mr. Reed been properly instructed in the use of the wagon, he would have operated the conveyor belt but would have turned off the beaters. Counsel's argument, however, is in contrast and in conflict to the testimony given by Mr. Reed, which clearly indicates Mr. Reed would not have turned off the beaters as it was easier to unload the wagon with them operating.

While there do not seem to be many cases from the State of Virginia involving the issue of contributory negligence in the use of machinery, there is much authority from foreign jurisdictions which is in point. The following cases are illustrative of those holding the plaintiff contributorily negligent as a matter of law:

Ries v. *Daffin Corp.*, 131 N.W.2d 577 S. D. (1964) is a wrongful death action against the manufacturer of a mobile feed mill, its owner and the employees who were operating the feed mill at the time of death. The decedent was experienced in handling farm implements and without informing anyone, entered the mixing tank of the mobile feed unit when the engine was running and the beater and augur were plainly visible. A verdict in favor of the plaintiff was set aside by the trial court and the appeal court sustained the action of the trial court. As the court stated:

> "As a general rule, a person 'who voluntarily places himself in, or remains in, a position which he knows, or with reasonable care should know, is dangerous . . . cannot recover for the ensuing injury." 3 Cooley on Torts (4th Ed.), Page 423. *Ries* v. *Daffin Corp.*, Supra. P. 579.

The Court found in that case the decedent had lived on farms all of his life and was experienced in the handling

of tractors and farm implements and stated that the plaintiff:

> ". . . deliberately chose to encounter a known or plainly observable hazard which the ordinary prudent person would not do. In other words, the danger of entering the mixing tank was either known or should have been known to him because of his past experience and because the danger was obvious". Supra. Page 580.

In *Starnes* v. *Stofferahn,* 160 N.E.2d 421 (S. D. 1968) the plaintiff recovered a jury verdict against the defendant, owner of some farm equipment, in a negligence action alleging failure to install shields or guards over the revolving shafts connecting the power takeoff and the unloading mechanism of the farm wagon and in knowingly furnishing a self unloading wagon which was in a dangerous condition by reason of a protruding set screw. Yet the plaintiff testified that he had connected the power shaft to the tractor, starting the power takeoff, and after entering the wagon over the front end for the purpose of pushing sileage over the moving cross bars, he was in the process of leaving the wagon backwards with his left food next to the power takeoff equipment when the accident occurred. In setting aside the jury verdict and ordering that final judgment be entered for the defendant, the Court stated:

> "The undisputed evidence is that plaintiff was familiar with the operation of farm machinery and with shafts and connections for the transmission of power to such machinery. . . . The takeoff equipment with which plaintiff came in contact was in plain view. The danger of coming in contact with this mechanism when in operation was open and obvious. . . . an employer is not bound to warn and instruct his employee as to defects and dangers which are open and obvious. A danger is considered as within the rule where it ought to have been apparent to the senses of a person of ordinary intelligence, or

> where it is as easily discernible by the employee as by the employer, or where it is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety." *Starnes* v. *Stofferahn*, Supra. P. 425.

Blunk v. *Allis-Chalmers Manufacturing Company*, 242 N.E.2d 122 (Ind. 1968) also involved injuries sustained in the use of farm equipment. The farmer sustained injuries in an accident involving a corn picker which was designed and manufactured by the defendant. The farmer left the power takeoff on while he dismounted the tractor to unclog the corn picker, and when attempting to remount the tractor was seriously injured when his foot fell into the rollers after slipping on a moist fender. The trial court sustained a motion for a directed verdict and the appeal court affirmed that ruling.

The Court pointed out that the farmer had been engaged in farm work for a number of years and was familiar with the various types of equipment normal to farming. That Court, in delineating the appropriate law of Indiana stated:

> "In applying this test both the Supreme Court and the Appellate Court have adopted the rule that the voluntary conduct of one exposing himself to dangers which are so obvious, imminent and glaring that no reasonable man exercising due care for his safety would have hazarded them is negligence as a matter of law." P. 125.

This statement of the law would certainly be considered a paraphrase of many cases on contributory negligence from the Supreme Court of Virginia, and in addition, there is certainly a parallel between a person slipping on a moist fender and a person slipping on a moist pile of cut ensilage.

There are many other cases which have considered the issue of contributory negligence including *Strickler* v. *Sloan*,

et al, 141 N.E.2d 863 (Ind. 1957); *Hunsberger* v. *Wyman*, 216 N.E.2d 345 (Ind. 1966); *Vilanueva* v. *Nowlin*, 420 Pacific 2d 764, (N. M. 1966) to name a few. However, counsel will not enumerate any further cases but would submit that these cases certainly show the trend of other courts.

A. Plaintiff's Affidavits.

Petitioner complains that the trial court considered only the depositions and did not consider the affidavits tendered to the court as pretrial exhibits. It is difficult to understand how Petitioner can hope to prevail on this claim when his own statement of the case in his Brief filed with the Supreme Court of Virginia advised that Court that the affidavits of Smith, Beachley and Anderson "were tendered in evidence at pretrial proceedings" and that "both the said depositions and affidavits were considered in all cases herein by the court below." However, even if the trial court did not consider the affidavits, the court was perfectly right in not doing so. Affidavits cannot be admitted in evidence. They were *ex parte* statements, and counsel for Defendants were not afforded an opportunity for cross-examination. The affidavits do not constitute proof and they should not have been considered.

That the trial court did consider the affidavits seems apparent from the letter of Judge Penn wherein he stated:

> "The affidavits filed by plaintiff as a proffer of evidence of custom and usage in the community must be rejected where the danger is so obvious and patent. Further, such evidence would tend to contravene plaintiff's theor of exposure to danger." (App., p. 13.)

Properly construed, this language of the trial court means that the court did consider the affidavits but concluded that

the statements therein contained would not alter the judgment of the court that plaintiff was guilty of contributory negligence as a matter of law.

Counsel for the Petitioner relies upon the cases of *Kerth* v. *Clinchfield Coal Corp.*, 189 Va. 592, 54 S.E.2d 126 and *C & M Promotions* v. *Ryland*, 208 Va. 365, 158 S.E.2d 132. A close review of these cases, however, clearly shows that the trial court properly applied the law as laid out therein. The Supreme Court of Virginia, in *Clinchfield Coal*, stated:

> "The general usage of the business in a given situation is admissible as evidence of what is reasonable and proper to be done in that situation . . . If there be no conflict of evidence as to the existence of the general usage, and *nothing in the evidence tending to show, as to employees, that the usage was not reasonably safe or adequate for its purpose and occasion*, and nothing, as to strangers, tending to show that the usage did not afford as high protection as would result from any other known and practical methods of the business, then the usage itself is conclusive evidence of the exercise of ordinary care . . ." (Emphasis added, p. 130.)

Also, in *C & M Promotions*, the Supreme Court of Virginia stated:

> " . . . If there is no conflict in the evidence as to the existence of general usage, *and nothing tending to show that the usage was not reasonably safe or adequate for its purpose and occasion*, such usage is conclusive evidence of the exercise of ordinary care." (Emphasis added, pp. 134, 135.)

The trial court quite correctly applied the law in that even if the custom was to unload ensilage wagons in the manner in which Mr. Reed was unloading the ensilage

wagon in question, then certainly it "was not reasonably safe or adequate for its purpose and occasion" and properly rejected the proffer of the evidence of custom because of the obvious and patent danger.

The Petitioner suggests that the trial court did not consider the fact that all the evidence was not available at the time it made its ruling on the Motion for Summary Judgment. He suggests all of the evidence was not complete and he had further evidence to submit to the Court; however, he overlooks the fact the very case he cites, *Simpson* v. *Broadway-Manhattan Taxi Cab Corp.*, 203 Va. 892, 128 S.E.2d 306 (1962), while holding that a Summary Judgment is not meant as a substitute for trial where an issue of facts still exists, it also holds that a Motion for Summary Judgment should be granted where no further evidence could affect the result. It holds applying the fact of this case to the rulings in that case, that if there is a finding of contributory negligence on the part of the Plaintiff which would bar his action no matter what further facts were brought out, that the Court should indeed sustain a Motion for Summary Judgment if it found contributory negeligence sufficient to bar the action. The trial court, using the standard of care of the ordinary and prudent person, found Mr. Reed to be guilty of contributory negligence as a matter of law and therefore appropriately awarded a Summary Judgment.

B. Motion for Summary Judgment Based on Pretrial Depositions.

Petitioner contends that the trial court erred in awarding summary judgment upon the testimony of the Plaintiff as disclosed by the pretrial depositions. In support of his contention he relies upon VIRGINIA CODE § 8-315.1.

It is important to note the sequence of events in order to determine whether this section of the Code is applicable. The trial court filed its letter opinion on November 27, 1972. (App., p. 13). The final orders in the cases of Carlyle & Martin, Inc. and Carlyle & Anderson, Inc., were entered by the Court on the second day of February, 1973. The final order in the case of *Reed* v. *Grove Manufacturing Company* was entered March 13, 1973. (App. p. 40).

First, it is significant to note that Plaintiff made no objection in the trial court based upon that Code section, nor did Plaintiff assign as error the action of the court in considering the pretrial depositions on the ground that they could not be properly considered in view of that section of the Code. In the second place, it is important to note that that Code section was not approved until March 20, 1973, and it did not become effective until July 1, 1973.

The statute in question should be considered to operate prospectively and not retroactively. In 17 MICHIE'S JURISPRUDENCE, § 73, p. 335, is found a statement of the general rule:

> "The general principle that statutes should be given a prospective rather than a retrospective construction has been given statutory approval. And words of a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise defined. Failure of the legislature to express an intention to make a statutory retroactive evidences a lack of such intention."

In *Edmunds Ex'r* v. *Bruce*, 88 Va. 1007, 14 S.E. 840 (1892), the court held that the statute directing that a jury try the question of usury which was in effect at the time the action was brought, would apply even after a new statute di-

recting that such a question be submitted to a commissioner. In other words, the court held that the statute in existence at the time of the action controlled.

In *Ferguson* v. *Ferguson,* 169 Va. 77, 192 S.E. 774 (1937), the court was dealing with the statute of limitations. It was there contended that the statute should operate retroactively. Of course, the statute of limitations is generally a remedial statute. While the court stated that the statute in question involved a right conferred as well as a remedy, the language of the court clearly indicates that unless the language of the statute clearly requires a retroactive effect, it will only be given a prospective operation, even though the statute in question is solely remedial. Spratley, J., in speaking for the court said:

> "A great majority of opinion, and we think the better opinion, applies the same rule of construction to new or changed provisions of statutes of limitation that it applies to the construction of other statutes. In following this rule, the new enactment is held to apply to all rights or causes of action after its passage, leaving all rights or causes of action existing at the time of such passage subject to the operation of prior limitations unless otherwise provided. Therefore, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute, will not be affected by it, but will be governed by the original statute, unless a contrary intention is expressed in the later statute." 169 Va. at 87.

Duffy v. *Hartsock,* 187 Va. 406, 417, 46 S.E. 570 (1948). This case also involved the statute of limitations. The opinion of the Court considered *Ferguson* v. *Ferguson, supra,* and *Gloucester Realty Corp* v. *Guthrie,* 182 Va. 869, 30 S.E. 686 (1944). In considering those cases, the court pointed out that there was involved a problem of

remedy as well as a right. However, the court further stated:

> "That the legislation affecting matters of remedy may be retroactive in operation, if so expressed and intended, is unquestioned. If the intent so to do is made clear, retroactive effect is given." 187 Va. at 417.

The court pointed out that the statute specifically used the words "judgment heretofore or hereafter rendered" and clearly indicates that the amendments were not limited to judgments rendered after their effective date. In the opinion, the court quoted with approval *Whitlock* v. *Hawkins,* 105 Va. 242, 53 S.E. 401 (1906):

> "'"Retrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest; but the legislature may, in its discretion, pass retrospective and curative laws, provided they do not partake of the nature of what are technically called *ex post facto* laws, and do not impair the obligation of contracts, or disturb vested rights; and provided, further, they are of such nature as the legislature might have passed in the first instance to act prospectively.
>
> * * * * * * *
>
> "'"The presumption of law is opposed to giving them a retroactive effect unless a contrary intent is manifest. . . ."'" 187 Va. at 419.

See also Crawford v. *Halsted,* 20 Gratt. 211 (1871).

We earnestly insist, therefore, that the statute relied upon by Petitioner is not applicable in the case at bar because it did not become effective until after the trial court entered judgment for Defendant. Certainly this Court will not hold that the trial court committed error in considering

the depositions, when the statute had not been approved and had no application.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied. The Supreme Court of Virginia was clearly correct in affirming the trial court's findings of contributory negligence as a matter of law and the granting of summary judgment to the Respondents. There was no unconstitutional denial of a jury trial to the Petitioner.

Respectfully submitted,
s/THOMAS C. PALMER, JR.
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Respondents in Opposition was mailed, postage prepaid, to Roland D. Hartshorn, Esquire, THOMAS, THOMAS & HARTSHORN, 6577 Backlick Road, Springfield, Virginia, 22150, the 27th day of June, 1974.

s/THOMAS C. PALMER, JR.